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I. Introduction

Appellant, Joshua Billings (hereinafter (“Billings” or “Union Employee”), appeals the court’s Order applying collateral estoppel to an adverse labor arbitration decision to grant summary judgment dismissing claims of wrongful termination. The Union Employee asserted claims pursuant to 42 U.S.C. §1983 for violation of his First Amendment rights; discrimination and retaliation claims under RCW 49.60 Washington Law Against Discrimination Claims (“WLAD”); and wrongful termination in violation of public policy claim against his employer the Town of Steilacoom (hereinafter “Steilacoom” or “Employer”) and Steilacoom Public Safety Chief, Ron Schaub (“Chief Schaub” or “Schaub” and Steilacoom Town Manager, Paul Loveless.

The employee received escalating harassment and ultimately termination after he took an active role in his Union’s affairs, raised concerns about matters of public concern pertaining to the conduct of Public Safety Chief, Ron Schaub *including* discriminatory hiring, waste of public funds, patronage hiring, permitting unauthorized personnel to operate law enforcement vehicles with active emergency lights and making false statements. Billings also alleged that his return to work with a disability was attempted to be blocked and he was terminated upon his return to work with the disability in violation of the WLAD.

The Union Employee asserts that the court erred by disregarding United States Supreme Court precedent and applying collateral estoppel to a labor arbitration decision working an injustice against the Union Employee. The arbitration was managed by Billing's union, the Steilacoom Police Officers Guild ("SPOG") a small, nine member guild, with scarce resources. The Union Employee's constitutional claims, claims of violation of public policy and violation of the WLAD were never fully and adequately addressed in an arbitration proceeding managed by SPOG. The Arbitrator's award even indicated that Billings could pursue such claims privately in a different forum.

Billings further asserts that the trial court improperly struck from the record the Declaration from Sgt. Robert Glen Carpenter, a use of force expert consulted by Steilacoom detailing his review of the Union Employee's use of force with Chief Schaub, his determination that Billings acted appropriately in his use of force and the actions of Chief Schaub to prevent a record of Sgt. Carpenter's review from being made.

The trial court's errors wrongfully precluded the Union Employee *from having his* legitimate claims fully litigated in an impartial forum where he, and not his union, guided the presentation of evidence and shaped the issues toward his wrongful termination claims. The action blocked Billings' right to present these issues before a jury.

**II. ASSIGNMENTS OF ERROR AND
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.**

A. Errors of the Superior Court

- a. The court erred when it when it granted summary judgment dismissing all of the Union Employee's claims by applying collateral estoppel effect to an adverse labor arbitration decision.
- b. The court improperly disregarded the employer's burden of proof on their *Mt. Healthy* affirmative defense that they would have reached the same decision even in the absence of protected conduct by Billings.
- c. The court erred in striking the declaration of a fact witness describing Chief Schaub's knowledge of the appropriateness of the Union Employee's conduct and efforts by the Employer to suppress this opinion from the review of the Union Employee's conduct.

B. Issues Related to Assignments of Error.

- a. What is the appropriate standard of review for Summary Judgment decisions?

- b. *May collateral estoppel be applied against a Union Employee based upon a labor arbitration handled by the Union Employee's union?*
- c. *If collateral estoppel may be applied against a Union Employee based upon a labor arbitration under the CBA, did the application of collateral estoppel in this work an injustice upon the Union Employee?*
- d. *Was the Declaration of Sgt. Robert Glen Carpenter improperly stricken from the Union Employee's reply to Summary Judgment?*

III. STATEMENT OF THE CASE

A. Appellant's Statement of Facts.

1. Background.

Plaintiff Joshua Billings ("Billings") began his employment with the Town of Steilacoom ("Steilacoom") as a Public Safety Officer in December 2001. (CP 1639). Public Safety Officers in Steilacoom perform the dual function of law enforcement officers and fire fighters. Loveless Dec. ¶ 7. (CP 113) Billings was subsequently promoted to Sergeant and Fire Operations Chief. Billings Dec. ¶2, 41. (CP 1639, 1652). Billings was demoted in May 2012 and fired on September 25, 2012. Billings Dec. ¶¶2. (CP 1639). The Arbitrator overturned the

demotion. Billings Dec. ¶ 67; Arbitration Award pgs. 35-36. (CP 73-74).

The arbitrator affirmed the termination. (CP 92).

Billings was covered under a collective bargaining agreement (“CBA”) Wooster Dec. Ex. 2 with the Steilacoom Police Officers Guild (“SPOG”). (CP 1607-1636) SPOG is a very small union with just nine members. Billings Dec. ¶ 70. (CP 1658) Billings was actively involved in the SPOG. Billings Dec. ¶¶ 5, 6, 8, 28, 38. (CP 1640-41, 1648, 1651). The grievance procedure is limited to actions alleging interpretation or application of the CBA. CBA, pg. 10, Wooster Dec. Ex.2. (CP 1616-17). The Union controlled the grievance process, not Billings. Billings Dec. ¶70 and Wooster Dec., Ex. 1. (CP 1605, 1657-58).

2. Arbitration Proceeding.

The PSOG filed grievances on both the demotion and the termination alleging the actions violated the CBA. Billings Dec. ¶70. (CP 1657-58, 39-94) Hoffman Dec. ¶5 (CP 133). The SPOG pursued the grievances to arbitration and the arbitrator overturned the demotion (Arbitration Award pgs. 35-36(CP 73-74). The arbitrator affirmed the termination. (CP 92). Arbitration Award, Appendix A to Defendants’ Motion for Summary Judgment. (CP 39-95).

There were other procedural problems with the SPOG arbitration. The hearing was not transcribed by a court reporter because the union could not afford the expense of a court reporter and Steilacoom refused to

consent to an electronic recording of the proceedings. Billings Dec. ¶¶ 39, 40. (CP 1651) The Arbitration Award was full of inaccuracies. Billings Dec. ¶¶ 41-66. (CP 1651-1657).

The Arbitrator recognized the claims that are the subject of this appeal that were dismissed on Summary Judgment were not addressed during the arbitration and the Arbitrator affirmatively asserted that Billings should bring his retaliation claims in a different forum. Billings ¶ 67, Ex. 4. (CP 1657, 1691) So the issues present in Billing's civil trial are unrelated to the CBA and were not considered or litigated in the Arbitration. Billings Dec. ¶69. (CP 1657). The Defendants assert the arbitrator's finding that there was "just cause" to terminate Billings collaterally estoppes Billings from arguing he was satisfactorily performing his duties (CP 28) and that Steilacoom had "legitimate, non-discriminatory reasons for terminating Billings in September 2014." (CP 27)

The arbitration was brought by the SPOG and not Mr. Billings so he had no control over what evidence was presented and his rights were not fully explored and protected. Billings Dec. ¶¶ 69, 70. (CP 1657-58). Wooster Dec., Ex. 1. (CP 1605)

The SPOG had very limited resources with which to prosecute Billings' grievance. Billings Dec. ¶73, 70. (CP 1657-58). The SPOG had only nine members. (CP 1658). In the months leading up to the firing

of Billings, Steilacoom had engaged in a number of questionable labor practices that required the SPOG to expend its scarce resources challenging these acts. (CP 1640-41, 1648, 1658) The SPOG was also in the midst of negotiating a new collective bargaining agreement that further depleted the PSOG's resources. *Id.*

Billings had no right of appeal of the Arbitration Award. Billings Dec. ¶69. (CP 1657) "...[D]ecision shall be final and binding on both parties." Wooster Dec. Ex. 2, pg. 11 Step 5 (CP 1617).

Billings was not informed that the SPOG arbitration would have a preclusive effect upon his pursuit of his private legal rights Billings Dec. ¶71. (CP 1657) To the contrary, Billings was apparently advised by the Arbitrator that he could pursue his rights to assert his retaliation and discrimination claims in other forums. Billings Dec. ¶67, Ex. 4. (CP 1657, 1691). Had Billings known of the possibility of preclusive effect of the limited arbitration proceeding he would not have allowed it to proceed and would have gone directly to court to enforce his rights in a forum in which he, and not the PSOG, controlled the issues pursued, the depth of investigation and scope of evidence sought to be presented. Billings Dec. ¶ 71-72. (CP 1658)

Application of collateral estoppel caused Billings great hardship, denying him his right to a trial by jury. Billings Dec. ¶ 72. *Id.*

The arbitration decision was not a public forum. Billings Dec. ¶73. (CP 1658).

3. Billings' Concerns About Matters of Important Public Concern and Wrongful Termination in Violation of Public Policy.

Billings filed his initial wrongful termination Complaint alleging wrongful termination in violation of public policy, discrimination and retaliation for Billings disability or perceived disability; discrimination and retaliation for his lawful union activities; violation of RCW Title 41 and the Washington Law Against Discrimination, RCW 49.60, *et seq*; negligent and intentional infliction of emotional distress. Plaintiff's Complaint pg. 3 (CP 1-4). In the factual allegations of the Complaint Billings alleged *inter alia* that "Plaintiff was subjected to abusive, threatening and unlawful behavior by Defendant Schaub." "...Plaintiff opposed actions and policies proposed or implemented by Defendants." "Plaintiff filed formal complaints about Defendant Schaub's unlawful behavior." "Defendants responded by taking adverse employment actions against Plaintiff. *Id.*

Plaintiff sought leave to file a First Amended Complaint clarifying that his Complaint included a claim under 42 U.S.C. 1983 for violation of his First Amendment rights which was referenced by the facts pled in the initial complaint and his request for punitive damages stated in the initial

complaint. (CP 1566-66) Leave to amend was granted prior to the court ruling on the Defendant's Motion for Summary Judgment. (CP 1832-33).

Defendants brought their Summary Judgment Motion asserting that Plaintiff's claims for Defendants' actions prior to September 25, 2012 are barred by the statute of limitations. That Plaintiff's claims are barred by collateral estoppel. That plaintiff has failed to establish a claim of emotional distress, that the negligent hiring and retention claims should be dismissed. (CP 14-36) Plaintiff only opposed the application of collateral estoppel as a bar to his claims and the implicit suggestion that he alleged no facts supporting his claim of wrongful termination in violation of public policy. (CP 1588—89). The Defendant's Summary Judgment Motion was granted. (CP 1837-39).

Billings' Declaration points out numerous matters of public concern that he raised for which he asserts that he was retaliated against. These include the following: **(1)** Failure to follow promotional procedures established by law. Billings Dec. ¶4 (CP 1640); **(2)** Creating a new position of Fire Operations Chief as an improper procedure and unnecessary expense. Billings Dec. ¶¶5, 8. (CP 1640,-41) **(3)** Threats and abuse by Chief Schaub and Fire Operations Chief McVay to Billings and others. Billings Dec. ¶¶ 7, 14, 53, 68, Ex. 5. (CP 1641, 1642-43, 1655, 1657, 1692-1700) **(4)** Billings opposed splitting the function of Public

Safety Officers into two separate positions of law enforcement and fire fighters as an unnecessary and unwarranted expense undertaken without taxpayer input. Billings Dec. ¶ 31, 36. (CP 1649-50) **(5)** Chief Schaub and others engaged in discriminatory and improper hiring practices. Billings Dec. ¶¶ 4, 8, 9, 27, 63. (CP 1640-41, 1647-48, 1656) **(6)** Using volunteers to fill paid positions. Billings Dec. ¶28, 51. (CP 1648, 1654) **(7)** Allowing Fire Operations Chief McVay to operate and use a law enforcement vehicle equipped with blue lights in violation of law, even though McVay had previously been dismissed from two law enforcement agencies. Billings Dec. ¶¶10, 15-23, (CP 1641, 1643-46) **(8)** Billings Fire Department Badge number was arbitrarily changed from “2” to “66” to obscure his supervisory status creating a safety issue. Billings Dec. ¶ 30 (CP 1648-479). **(9)** Chief Schaub demonstrated dishonesty and Steilacoom blocked an outside investigation into the charge of dishonesty by falsely alleging the charge was already under investigation by Steilacoom. Billings Dec. ¶¶ 34-35 (CP 1649-50). **(10)** Steilacoom retaliated because of Billings’ disability and arbitrarily blocked his return to work and fired him the day he returned. Billings Dec. ¶¶ 32, 33, 37. (CP 1649-51).

The arbitration did not allow evidence on discriminatory hiring practices or the waste of funds from the splitting of the Public Safety

Office into two separate bureaucracies, fire and law enforcement. (CP 1657).

In addition to Fire Operations Chief McVay being allowed to operate a law enforcement vehicle in violation of law (CP 1643-46, 1670—89); Fire Operations Chief McVay was a friend of Public Safety Chief Schaub (CP 1641) who was hired into a newly created and expensive position which the Union and Sgt. Billings had vigorously opposed (CP 1640-41). Prior to completion of the hiring process, Fire Operations Chief McVay was boasting that he already had the position. (CP 1640) More qualified candidates were told they could not apply. (CP 1641). Fire Operations Chief McVay engaged in discriminatory actions toward applicants for work in the Public Safety Office. (CP 1647-48). McVay at Straub's direction changed Sgt. Billings' badge number from 2 to 66, a move that created confusion at emergency scenes and obscured Sgt. Billings' status as second in command of the fire operation which created a potential danger. (CP 1648-49)

Both McVay and Chief Straub pushed for splitting the law enforcement functions of the Public Safety Department into two separate departments, one for law enforcement and one for firefighting and emergency response. (CP 1649-51) Sgt. Billings actively opposed this matter of important public concern because it posed a huge expense for the

Town of Steilacoom that was being proposed without citizen input or vote. (CP 1649-51).

Sgt. Billings filed a complaint that Chief Straub had lied. (CP 1649-50) When the Pierce County Sheriff's Office contacted Paul Loveless to investigate the allegations, Paul Loveless falsely stated that the matter was already under investigation by Steilacoom in order to prevent any investigation. (CP 1650).

Billings has provided a time line showing many of the issues of public concern that he has raised and the corresponding response from the Town of Steilacoom and its agents. (CP 1640, 1661-65).

The alleged basis for the termination are set out by Defendant Schaub in a termination letter dated September 25, 2016. (CP 1293-1309). Chief Straub had departed from established process of having disciplinary investigations carried out by independent third parties and conducted the investigations himself and acted as the decision maker on his own investigation. (CP 1642).

4. Exclusion of Glen Carpenter's Declaration.

One of the basis asserted for Sgt. Billings' termination was his use of force and tactics in restraining a suspect who was attempting to pull a gun on Sgt. Billings during an encounter with the suspect in his vehicle. (CP 1293-1295). Although, Sgt. Billings was exonerated in the claim of

“Potential Use of Deadly Force” (CP 1295) Chief Straub did not disclose that he had asked the Pierce County Sheriff’s Office defensive tactics expert, Glen Carpenter to review the video tape of the encounter and the reports of the incident. (CP 1655, 1515-19)

Sgt. Billings presented a declaration, including e-mails from Chief Straub to Sgt. Carpenter (CP 1712-15) detailing Sgt. Carpenter’s look into the situation at the request of Chief Schaub and the request from Chief Schaub that Sgt. Carpenter not prepare a report of his findings. (CP 1706-15). The Defendant moved to strike Sgt. Carpenter’s declaration. (CP 1774-75). Billings opposed the motion. (CP 1828-30). The trial court granted the motion to strike Sgt. Carpenter’s declaration. (CP 1834-36). The Declaration is relevant because Chief Straub withheld the fact he had consulted an outside expert that confirmed Sgt. Billings would have been justified in using deadly force in the encounter at dispute. Sgt. Carpenter reports that he informed Chief Straub the following: “After reviewing the materials, I again met with “Chief” Schaub. I informed “Chief” Schaub that I had reviewed all of the materials and that I did not believe that PSO Billings had engaged in an improper use of force. Further, I informed him that PSO Billings had actually been able to gain control of the suspect and obtain compliance without escalating to the use of deadly force and that such compliance was a desirable and good outcome for the

encounter.” (CP 1708) Sgt. Carpenter also acknowledge that the encounter produced a good outcome and nobody was shot. *Id.*

5. Plaintiff’s Disability Discrimination Claims.

Sgt. Billings was injured during an assault in the line of duty and was off work from May 2012 until September 2012. (CP 1649). When Sgt. Billings was released by his physician to return to work, he was directed to go to separate doctor hired by Steilacoom to evaluate his ability to return to work. When that doctor agreed Sgt. Billings was fit for duty, Sgt. Billings was immediately fired upon his return to work. (CP 1651).

IV. LEGAL DISCUSSION

A. Standard of Review.

The standard of review for an order granting or denying summary judgment is *de novo*. The appellate court performs the same inquiry as the trial court. The appellate court reviews *de novo* a trial court ruling on a motion to strike evidence made in conjunction with a summary judgment motion. *Momah v. Bharti*, 144 Wn. App. 731, 749, 182 P.3d 455 (2008) (“The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.”) (alteration in original) (quoting *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998)). A motion for summary judgment is properly granted only where ‘there is no genuine

issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.’ The reviewing court should view “the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party.” *Ruvalcaba v. Kwang Ho Baek*, 175 Wn. 2d 1, 6, 282 P.3d 1083, 1085-86 (2012) (internal citations omitted).

Only when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law should the motion be granted. A material fact is defined as one upon which the outcome of the litigation depends. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 565 P.2d 1030 (1982). The moving party must show that there is no genuine issue of material fact, however, once the moving party has met its burden, the burden then shifts to the non-moving party who must show that there is a genuine issue of material fact. *Id.*

Here the Defendants relied upon the findings of the Arbitrator (CP 39-94) that were inconsistent and did not specifically address the issues embraced by the Union Employee’s claims of constitutional violations, retaliation under the WLAD or termination in violation of public policy. *Id.*

1. Special Consideration Required for Cases Brought Under the Washington Law Against Discrimination.

Discrimination cases have a unique status on proof. Our laws prohibiting unlawful discrimination have successfully driven discrimination underground. Cases turn on jurors' interpretation of indirect acts demonstrating patterns of conduct revealing unlawful discriminatory or retaliatory motives rather than direct evidence. Modern discrimination cases rarely rely upon overt acts of discrimination such as repeated epithets, nooses hung in the work place or *quid pro quo* sexual demands presented in front of witnesses. The Washington Supreme Court joins other courts acknowledging this reality.

Direct, "smoking gun" evidence of discriminatory animus is rare, since "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), and "employers infrequently announce their bad motives orally or in writing." *deLisle v. FMC Corp.*, 57 Wn.App. 79, 83, 786 P.2d 839 (1990). Consequently, it would be improper to require every plaintiff to produce "direct evidence of discriminatory intent." *Aikens*, 460 U.S. at 714 n. 3, 103 S.Ct. 1478. Courts have thus repeatedly stressed that "[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden." *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 860, 851 P.2d 716, review denied, 122 Wn.2d 1018, 863 P.2d 1352 (1993). "Indeed, in discrimination cases it will seldom be otherwise" *deLisle*, 57 Wn. App. at 83, 786 P.2d 839. Recognizing this reality, the United States Supreme Court established an evidentiary burden-shifting protocol in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to "compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins*, 490 U.S. 228,

271, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (O'Connor, J., concurring). "The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the "plaintiff [has] his [or her] day in court despite the unavailability of direct evidence." " *Sellsted*, 69 Wn.App. at 864, 851 P.2d 716 (first alteration in original) (quoting *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 898 (3d Cir.), cert. dismissed, 483 U.S. 1052, 108 S.Ct. 26, 97 L.Ed.2d 815 (1987) (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985))).

Hill v. BCTI Income Fund-I, 44 Wn.2d 172, 179-80, 23 P.3d 440, 85 Fair Empl.Prac.Cas. (BNA) 1858 (2001).

In *Hill*, the Court rejected the "pretext plus" standard which was also rejected by the United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Once a court determines that the parties have met all three *McDonnell Douglas* intermediate burdens and that the record contains *reasonable but competing* inferences of *both* discrimination *and* nondiscrimination, "it is the jury's task to choose between such inferences." *Carle v. McChord Credit Union*, 65 Wn. App. 93, 102, 827 P.2d 1070 (1992) (citing *United States v. Stanley*, 928 F.2d 575, 577 (2d Cir.) cert. denied, 502 U.S. 845, 112 S.Ct. 141, 116 L.Ed.2d 108 (1991)). Billings was not afforded the opportunity to have a jury determine the Defendant's motives.

B. Application of Collateral Estoppel Was Not Appropriate in This Case.

Defendants assert that the Arbitrator's determination that "Billings seems to have lost his perspective on his job responsibilities" and "Billings has forfeited his opportunity to further serve the Town of Steilacoom as a Sergeant or officer" **has** "conclusively established that the Town's [sic] had legitimate, non-discriminatory reasons terminating Billings in September 2012." Defendants Mot. For S.J. pg. 14, lns. 21-26. (CP 27)

The Defendants go on to assert that the determination that Billings was unsatisfactory results in dismissal of his RCW 49.60 Washington Law Against Discrimination ("WLAD") claims by finding he cannot make a prima facia case under the McDonnell Douglas shifting burdens of proof to show he was performing satisfactorily in his job. Id. Pg. 15-16. (CP 28-29).

Defendants assert the Union Employee is collaterally estopped from denying he engaged in misconduct, or from asserting that the alleged misconduct was not the real reason for his termination or that the proffered reasons were just a pretext for discrimination. Id. Pg. 16. (CP 29)

Defendants go on to obliquely address the wrongful termination in violation of public policy claim and then asserts that Billings is precluded

from arguing those claims for the same reason as he is precluded from pursuing his WLAD claims. *Id.* Pg. 17 (CP 30),

Defendants assert that Billings may not pursue retaliation claims for the same reasons arguing the Arbitration Award because “he did engage in misconduct and policy violations, and that these conclusions properly supported a decision to terminate his employment...” *id.* Pgs. 18-19. (CP 30-31).

Collateral estoppel precludes relitigation of the same issue in a subsequent action between the same parties. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). Applying collateral estoppel may be improper where the issue is first determined after an informal, expedited hearing with relaxed evidentiary standards.” *Id.*

Collateral estoppel *may* be applicable to an action brought under our antidiscrimination laws. *Carver v. State*, 147 Wn.App. 567, 574, 197 P.3d 678 (2008) (emphasis added).

However, in order to prevail on a claim of collateral estoppel, the party seeking application of the doctrine bears the burden of showing (1) identical issues, (2) a final judgment on the merits, (3) identity of the parties, and (4) that application of collateral estoppel will not work an injustice against the estopped party. *Christensen*, 152 Wn.2d at 307, 96

P.3d 957. Application of the doctrine requires an affirmative answer to four questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom collateral estoppel is asserted a party or in privity with a party to the prior adjudication: and (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied? *Rains v. State*, 100 Wash.2d 660, 665, 674 P.2d 165 (1983).

1. Issues Are Not Identical.

Collateral estoppel should not be applied against the Union Employee because the issues are not identical. Regarding the first requirement, identical issues, our courts have determined that issues are not identical if the second action involves application of a different legal standard. *Cloud v. Summers*, 98 Wn.App. 724, 730, 991 P.2d 858 (1987). Such is the case here. There may be more than one motivation for a Defendant's unlawful actions and liability attaches if improper discriminatory motives were a "substantial factor" *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wash. 2d 302, 898 P.2d 284 (1995). An employer need only be motivated in part by retaliatory influences to violate RCW 49.60.210 (*Davis v. W. One Auto. Grp.*, 140 Wn.App. 449, 460, 166 P.3d 807 (2007); *Burchfiel v. Boeing Corp.*, 149 Wn.App. 468, 482, 205 P.3d 145, review denied, 166 Wn.2d 1038 (2009); *Renz v.*

Spokane Eye Clinic, PS, 114 Wn.App. 611, 621, 60 P.3d 106 (2002). In the arbitration the Arbitrator was not called upon to determine the employer's motivation. In fact the Arbitrator expressly left that analysis to a different forum. (CP 91, 1691). Rather than address the First Amendment implications of Billings' concerns, the Arbitrator simply observed the "rule of the shop" that Billings' concerns impacted his working relationships and justified a termination. (CP 89-90).

This commentary from the Arbitrator is a classic example of the arbitrator's appreciation of the "law of the shop," but not the nuanced analysis of the Union Employee's protected First Amendment rights or the broad protections afforded to those employees opposing conduct that violates the WLAD or have their own claims of discrimination.

Collateral Estoppel should not be applied if it will work an injustice. The injustice factor recognizes the significant role of public policy. *State v. Williams*, 132 Wash.2d 248, 257, 937 P.2d 1052 (1997). Thus, court may reject collateral estoppel when its application would contravene public policy. *State v. Dupard*, 93 Wash.2d 268, 275-76, 609 P.2d 961 (1980). Applying collateral estoppel in this case would prevent review of important public issues of corruption (CP 1640-41,1648-50), discrimination (CP 1640,1647-48, 1649,1651, 1656-57) retaliation, cronyism (CP (CP 1641-444,1646-48) and waste of funds and matters of public concern (CP 1640-41, 1649-51, 1654) from being fully reviewed.

Thus, the issues are not identical.

To the extent that the Defendants' argue that they would have made the same decision even without Billings' protected conduct, that argument is an affirmative defense upon which Defendants bear the burden of proof. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87, 97 S. Ct. 568, 575–76, 50 L. Ed. 2d 471 (1977). The Defendants did not plead this affirmative defense in the Answer to Plaintiff's Complaint and Affirmative Defenses. CP 10-11.

It is up to the jury to decide if Defendants carried this burden. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 862–63 (9th Cir. 2002), *aff'd*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). Questions of fact preclude summary judgment on Defendants' *Mt. Healthy* affirmative defense. A jury could determine that the sanction of termination is too extreme for the proven misconduct the City asserts has been established by the Arbitrator's decision. The jury could then determine that the Union Employee was fired in substantial part for his exercise of First Amendment rights, opposition to discriminatory conduct, his disability or in retaliation for his union activities in violation of public policy.

2. There Was No Final Judgment.

There was no "final judgment" on the merits. There is only the arbitrator's decision that was never reduced to a judgment. Technically,

the Arbitrator's decision is hearsay. ER 801.1 There is a split between Division 1 and Division 2 of the Washington Court of Appeals about when collateral estoppel can be applied to an arbitration award.

We respectfully disagree with Division One. In our judgment, an arbitration award is not the same thing as a final judgment of a court. We reach this conclusion primarily because Washington's statutory scheme for arbitration, RCW 7.04.010*et seq.*, provides a rather elaborate process for the confirmation, vacation, correction or modification of an arbitration award in court and for the entry of a judgment which conforms with the court's final determination. RCW 7.04.150, .160, .170, .180, .190. We can only conclude from a plain reading of these statutes that the Legislature did not consider an award in arbitration to be equivalent to a final judgment of a court. If it had it would have been unnecessary to provide a process to reduce the award to judgment. We conclude, therefore, that an award of arbitrators that has not been reduced to judgment pursuant to the statutory framework discussed above, is not equivalent to a judgment. It is, in our view, more akin to a jury verdict or a trial court's memorandum opinion or oral decision, determinations which are not considered equivalent to a judgment. *See State v. Mallory*, 69 Wash.2d 532, 419 P.2d 324 (1966), and *Bassett v. McCarty*, 3 Wash.2d 488, 101 P.2d 575 (1940).

Channel v. Channel By & Through Marsh, 61 Wash. App. 295, 298–301, 810 P.2d 67, 68–69 (1991)(refusing to give collateral estoppel effect to arbitration decision not reduced to judgment.)

¹ This argument was not presented to the trial court by Billings. An issue not raised in a summary judgment proceeding should not be considered on review. *See Ronald Sewer Dist. v. Brill*, 28 Wn.App. 176, 622 P.2d 393 (1980).

Although Chanel involves an interpretation of RCW 7.04.010 which does not apply to labor arbitrations, its analysis is persuasive. When an arbitration award is not reduced to a judgment, it should not be afforded collateral estoppel effect.

3. The Parties Are Not Identical.

The parties are not identical. The real party in interest at the CBA arbitration was Billings' union, the PSOG (CP 39, 1657-58)). In this appeal, the real party is the Union Employee, Billings. While Billings and the Union were in privity to the extent the Union was asserting Billings termination violated the collective bargaining agreement, the Union's objective was to uphold the CBA. The Union was not interested in exploring Billings' first amendment, discrimination or retaliation claims except in passing. (CP 1657-58)

The Arbitrator was particularly not interested in getting into those complicated and nuanced areas of the law and expressly left those issues for another forum. (CP 1691)

4. Application of Collateral Estoppel Would Work an Injustice Upon the Union Employee.

The application of the doctrine would work an injustice upon Billings. Billings' union was a poorly funded union, with a treasury already depleted because of Steilacoom's unfair labor practices, negotiation of a new contract and the number of issues created by the

questionable decisions of the Defendants. See Billings Dec. ¶¶ 70-73. (CP 1651, 1657-58) Billings was not informed the CBA arbitration decision would be given preclusive effect to his rights to privately pursue his claims outside the CBA and the Arbitrator's decision explicitly stated Billings could pursue his other claims and remedies in other forums. *Id.* ¶67, Ex. 4 (CP 1657-58, 1691). Billings was not allowed to raise issues regarding discriminatory hiring, waste or tax payer funds. *Id.* At ¶69. (CP 1657). No reviewable record was created, and the creation of a reviewable record was actively opposed by Defendants during the arbitration. *Id.* At ¶¶39-40 (CP 1651). The Defendants did not oppose this allegation in their reply materials. There was no right of appeal and Billings alleges numerous inaccuracies in the Arbitrator's findings. *Id.* at ¶¶ 69; 41-66. (CP 1651-57).

The Union Employee is denied a right to a trial by jury on his claims because of an agreement entered into by his union. The Washington State Constitution unequivocally guarantees that “[t]he right of trial by jury shall remain inviolate....” Const. art. I, – 21. An inviolate right “must not diminish over time and must be protected from all assaults to its essential guaranties.” *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Moreover, any waiver of a right guaranteed by a state's constitution should be narrowly construed in favor of preserving the right. *Burnham v. North Chicago St. Ry. Co.*, 88 F. 627,

629 (7th Cir.1898). While *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n. 5, 99 S.Ct. 645, 649, n. 5, 58 L.Ed.2d 552 (1979) holding that a party's right to jury trial is not infringed by the application of collateral estoppel based on a factual finding in a previous non-jury case, the importance of a party's right to trial by jury should encourage courts to tread cautiously before permitting offensive application of the collateral estoppel doctrine where it results in the loss of the right to a jury trial.

McDonald v. City of W. Branch, Mich., 466 U.S. 284, 285–93, 104 S. Ct. 1799, 1800–04, 80 L. Ed. 2d 302 (1984), establishes that the application of collateral estoppel is inappropriate when the results of a labor arbitration are used to prevent inquiry into important statutory claims asserted by a union employee seeking vindication of rights not litigated by his union in the labor arbitration and which protect important rights we hold dear in a civilized society. Billings' first amendment rights, right to advocate on behalf of his union members, petition the government for redress, opposing unlawful discriminatory actions and his right to seek review of his own claims he was discriminated against because of his disability were all barred by the summary judgment order. That order was issued in error and should be reversed.

Individual analysis of Defendants' application of the collateral estoppel doctrine to Plaintiff's different legal claims is unnecessary because the doctrine of collateral estoppel cannot be fairly or legally

applied against Mr. Billings to preclude this action to enforce any of the Union Employee's claims.

5. The Collateral Estoppel Doctrine Must Be Carefully Evaluated Before the Doctrine Is Applied and Strong Authority Precludes Applying the Doctrine in this Case.

Billings civil claims include civil rights issues under the WLAD and the First Amendment Pursuant to 42 U.S.C. §1983. (CP 1560-1563). The United States Supreme Court has noted the limited forum of a CBA arbitration is inappropriate to bar civil rights claims under application of collateral estoppel in a brief, well-reasoned decision. *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 285-93, 104 S. Ct. 1799, 1800-04, 80 L. Ed. 2d 302 (1984). ("*W. Branch*"). A copy of that decision was attached as Appendix 1 to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment. (CP 1592-1597).

The factual history of *W. Branch* closely parallels Billings' case. A police officer asserting First Amendment claims had been fired wrongfully. His union brought a grievance contending that there was "no proper cause" for his discharge, and that, as a result, the discharge violated the collective-bargaining agreement. The Arbitrator ruled against McDonald's union and upheld the firing of the police officer. Officer McDonald did not appeal the Arbitrator's decision but filed suit on his

civil rights claims. A jury returned a verdict for the Officer and against the Chief of Police who had fired him.

Defendants appealed and the 6th Circuit vacated the jury verdict asserting the parties had agreed to settle their disputes through the arbitration process and that the Arbitrator had considered the reasons for McDonald's discharge, that the arbitration process had not been abused and concluded the officer's First Amendment claims were barred by *res judicata* and/or collateral estoppel.

The Supreme Court accepted review and rejected that conclusion noting: On two previous occasions that court has considered the contention that an award in a CBA arbitration proceeding should preclude a subsequent suit in federal court had rejected the claim. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (Title VII claim discrimination claim) ("*Gardner-Denver*") and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), (minimum wage claim under the Fair Labor Standards Act) ("*Barrentine*"). Rejection of collateral estoppel in *Barrentine* and *Gardner-Denver* were based in large part on the conclusion that Congress intended the anti-discrimination statutes and wage statutes at issue in those cases to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes. 450 U.S., at 740-

746, 101 S.Ct., at 1444–1447; 415 U.S., at 56–60, 94 S.Ct., at 1023–25. *W. Branch* extended that logic to claims under 42 U.S.C. §1983. *W. Branch* 466 U.S. at 289.

The U.S. Supreme Court observed "... an arbitrator's expertise "pertains primarily to the law of the shop, not the law of the land." An arbitrator may not, therefore, have the expertise required to resolve the complex legal questions that arise in § 1983 actions "Second, because an arbitrator's authority derives solely from the contract, an arbitrator may not have the authority to enforce § 1983." "Third, when, as is usually the case, the union has exclusive control over the "manner and extent to which an individual grievance is presented," there is an additional reason why arbitration is an inadequate substitute for judicial proceedings. The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee." "Finally, arbitral fact-finding is generally not equivalent to judicial fact-finding." *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 290-91, 104 S. Ct. 1799, 1803-04, 80 L. Ed. 2d 302 (1984) (citations omitted).

The Supreme Court's legitimate concerns apply with equal force to this suit and Sgt. Billings. The Arbitrator specifically left Billings to pursue his claims in a separate forum; she had no demonstrable knowledge

of civil rights laws, either 42 U.S.C. §1983 or the WLAD; the CBA limited grievances to interpretation and application of the CBA (CP 1616-17); the union was in exclusive control and it was poorly funded (CP 1651, 1657-58) , Billings noted significant flaws in the Arbitrator's fact finding (CP 1651-1657) and at the arbitration Steilacoom vigorously prevented the development of a reviewable record of the proceedings (CP 1651) and Billings had no right of appeal. (CP 1657).

In bringing their Summary Judgment motion, the Defendant relied upon *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987) to extrapolate from collateral estoppel applied from a civil service hearing to their assertion that collateral estoppel using an adverse arbitration decision in an arbitration brought by a union under a CBA is appropriate. There are a major differences between a civil service hearing and a CBA arbitration. The Civil Service Hearing is a public hearing, requiring a full record of proceedings and the opportunity to appeal the decision through the courts. RCW 41.12.090. In *Shoemaker*, the Police Officer bringing the Civil Service appeal was represented before the Civil Service Commission by his own attorney and his claim was not prosecuted by a union on his behalf. *Shoemaker*, 109 Wn.2d at 505, 745 P.2d at 859-60.

In *Robinson v. Hamed*, 62 Wash. App. 92, 813 P.2d 171 (1991), *rev. denied*, Division 1 applied collateral estoppel effect to a CBA

arbitration decision involving a Boeing employee who was fired after he was alleged to have assaulted and broke the jaw of another Boeing worker at SeaTac airport.² Mr. Hamed was represented at the CBA arbitration by Seattle Professional Engineering Employees Association (SPEEA). *Id.* at 94, 813 P.2d at 171-172. The court may take judicial notice that SPEEA is a very large union with more than 22,650 members and that fact must be contrasted with Billings' nine person SPOG (CP 1658). Wooster Dec. Ex. 3. (CP 1638) The traditional rule is that courts may take judicial notice of facts which are within the common knowledge of the community. *Rogstad v. Rogstad*, 74 Wash. 2d 736, 741, 446 P.2d 340, 343 (1968). Judicial notice, of which courts may take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty. *State ex rel. Humiston v. Meyers*, 61 Wash. 2d 772, 779, 380 P.2d 735, 739-40 (1963).

It is respectfully asserted that *Hamed* was wrongly decided and is contrary to *W. Branch* and the rule in Division 2 announced in *Channel* that a CBA arbitration award is not a judgment upon which collateral estoppel may be asserted when it has not been reduced to a judgment.

² In addition to the CBA arbitration in *Hamed* there was also a criminal trial and an employment security hearing.

Hamed discusses both *W. Branch* and *Gardner-Denver* but dismisses those decisions without analysis noting that: “The Supreme Court has since made this position [that decisions were limited to certain federal claims] clear, and has retracted its apparent mistrust of the arbitral process. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)” *Hamed*, 62 Wash. App. at 98. The *Hamed* court’s reliance on *Gilmer* is misplaced as *Gilmer* simply indicated that the parties might agree to arbitrate claims of age discrimination. Private parties agreeing to enforce a private arbitration agreement does not translate to an acceptance of a CBA arbitration award as the basis for collateral estoppel and the *Hamed* decision did not discuss the problems with applying the collateral estoppel doctrine to a CBA arbitration that have been outlined in *W. Branch*, *Gardner-Denver* and *Barrentine*. *W. Branch* is still good law and both the *Hamed* court and the trial court in Billings’ case erred in rejecting it.

Courts from other jurisdictions reviewing this issue have agreed concluding collateral estoppel should not be applied using a CBA arbitration finding of “just cause” to block a state claim. *Taylor v. Lockheed Martin Corp.*, 113 Cal. App. 4th 380, 385–86, 6 Cal. Rptr. 3d 358, 361–62 (2003). (“...[T]he basic rule of *Alexander*, *Barrentine* and *McDonald* remains intact, and a labor arbitration can have preclusive effect on a subsequent statutory claim only if the CBA contained a clear

and unmistakable waiver of the employee's right to file a lawsuit on the statutory claim. (*Camargo v. California Portland Cement Co.* (2001) 86 Cal.App.4th 995, 1013–1014, 103 Cal.Rptr.2d 841.”).

Miller v. Pond, 171 Ohio App. 3d 347, 347–53, 870 N.E.2d 787, 787–91 (2007) (“Additionally, appellant is not collaterally estopped from bringing suit for a violation of the FMLA even though the arbitration dealt with the same facts and the same parties. In *McDonald v. W. Branch, Michigan* (1984), 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302, the United States Supreme Court explained that Congress intended statutes like the Fair Labor Standards Act and the Civil Rights Act to be judicially enforceable and that arbitration cannot be an adequate substitute. Section 2617 of the FMLA provides that an employee may file a complaint with the secretary of labor or bring an action against an employer, an indication that Congress intended the statute to be judicially enforceable.”

Andrews v. May Dep't Stores, 96 Or. App. 305, 305–13, 773 P.2d 1324, 1324–28 (1989) (refusing to apply *res judicata* or collateral estoppel to a labor arbitration decision adverse to an employee who was asserting claims of disability discrimination and Family Medical Leave Act interference even where those issues were expressly part of the employee’s defense to the employer’s claim of just cause for termination).

Genovese v. Gallo Wine Merchants, Inc., 226 Conn. 475, 475–97, 628 A.2d 946, 946–56 (1993) (refusing to apply *res judicata* or collateral

estoppel effect to a labor arbitrator's finding the employee voluntarily quit his job as a bar to a statutory claim of retaliatory discharge for filing a worker's compensation claim.). The opinion notes that applying collateral estoppel to labor arbitrations may result in more litigation as employees chose to by-pass the CBA arbitration forum in favor of a forum where they control the evidence and issues litigated.

Miller v. Cty. of Glacier, 257 Mont. 422, 422–28, 851 P.2d 401, 401–04 (1993) (reversing application of collateral estoppel from finding of “just cause” for insubordination to preclude 42 U.S.C. §1983 claim and remanding other state law claims for determination if the parties agreed to arbitration of those claims as the exclusive avenue of relief).

This court should align itself with the decision in *McDonuld v. City of W. Branch, Mich.*, 466 U.S. 284, 285–93, 104 S. Ct. 1799, 1800–04, 80 L. Ed. 2d 302 (1984) and those decisions cited above and remand this matter for a full hearing on the merits of what motivated the Defendants to fire the Union Employee and not deny Billings his right to have a jury weigh in on these issues.

6. The WLAD Protects the Union Employee's Rights to Pursue Both Arbitration and His WLAD Claims.

Billings' claims include WLAD claims under RCW 49.60. *et. seq.* RCW 49.60.020 provides under the heading "Construction of Chapter – Election of Other Remedies" the following:

"The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any other laws of this state relating to discrimination because of race, color, creed, national origin, sex, marital status, sexual orientation, age, honorably discharged veterans of military status, or the presence of any sensory, mental or physical disability, other than a law which purports to require or permit doing any act which is an unfair practice under this chapter. **Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon the alleged violation of his or her civil rights.** This chapter shall not be construed to endorse any specific belief, practice, behavior, orientation. Inclusion of sexual orientation in this chapter shall not be construed to modify or supersede state law relating to marriage." (Emphasis added).

The mandate of liberal construction set forth in RCW 49.60.020 is a recognition that as declared in RCW 49.60.010 Washington's law against discrimination (WLAD) "embodies a public policy of the highest priority..." See *Martini v. Boeing Company*, 173 Wn.2d 357, 364, 971 P.2d 45 (1999). The requirement that the statute be subject "liberal construction" is what separates the WLAD from Title VII, which does not have a similar provision. See *Martini* at 372. As a result, while federal law on occasion can provide guidance, and can be persuasive, it is not controlling particularly when it is inconsistent with the application of such a mandate. *Id.*

As noted in *Lodis v. Corbis Holdings, Inc.* 172 Wn. App.835, 292 P.3d 779, 787 (2013) where the WLAD provisions are "radically different" from federal law Washington courts must diverge from federal statutory interpretation and apply the statute in a manner consistent with its purposes and the command of liberal construction.

An earlier version of RCW 49.60.020 had an "election of remedies" provision which was legislature removed in 1973. See *Barb Restaurants, Inc. v. Washington State Board Against Discrimination*, 73 Wn.2d 870, 441 P.2 526 (1968) ("Election of remedies" provision precluded pursuit of an administrative complaint when the employee had already utilized collective bargaining (CBA) procedures).

In the case of *Reese v. Sears, Roebuck and Co.* 107 Wn.2d 563, 575-579, 731 P.2d 497 (1987), the Supreme Court explored the implications of the 1973 repeal of the "election of remedies" provision which had previously existed in RCW 49.60.020.3 In *Reese* the Supreme Court rejected the notion that prior to bringing a discrimination claim that the employee had to first exhaust CBA remedies. Rather, the clear

3 See *Reese v. Sears, Roebuck and Co.*, 107 Wn.2d 563, 575-579, 731 P.2d 497 (1987), overruled on other grounds, *Phillips v. City of Seattle*, 111 Wn.2d 903, 766 P.2d 1099 (1989) (*Phillips* overruled *Reese's* determination that the existence, or nonexistence, of a protected disability was a question of law, finding that such a matter properly should be deemed a question of fact for the jury) There is nothing within the *Phillips* opinion which in any way overruled the dispositive holding in *Reese* relating to the issue discussed above.)

holding in *Reese* is that due to the important public policies which animate the WLAD, RCW 49.60. *et. seq.* an aggrieved employee can pursue both CBA contractual remedies, and file a lawsuit bringing claims pursuant to RCW 49.60. *et. seq.* Reaching this conclusion the Court looked directly to the above-emphasized language within RCW 49.60.020. The Supreme Court's conclusion that an employee can pursue *both* CBA remedies and thereafter file a lawsuit, if unsuccessful in such a proceeding is unequivocal.

“The legislature intended actions under RCW 49.60 be independent from collective bargaining procedures. By amending RCW 49.60 to remove the election of remedies barred, laws of 1973, Ch. 141, Section 2, the legislature intended the statute to preserve all remedies an employee may have for an alleged violation of his civil rights. We therefore conclude that employees may choose to vindicate their civil rights by immediately filing a civil action under RCW 49.60 or they may wait, pursue a remedy under the collective bargaining agreement, and *if their civil rights remain unenforced, file a civil discrimination action pursuant to RCW 49.60.*

Reese 107 Wn.2d at 578. (emphasis supplied).

The above-emphasized language in RCW 49.60.020 is a legislative recognition that there should be other means of redress available to victims of discrimination other than those set forth within the state statute. See *Bennett v. Hardy*, 113 Wn.2d 912, 927, 784 P.2d 1258 (1990), citing to *Seattle Newspaper-Web Pressmen's Union Local 26 v. Seattle*, 24

Wn.App. 462, 467, 604 P.2d 170 (1979). Ultimately, the ability to pursue multiple even overlapping remedies is consistent with the statutory purpose of eradicating discrimination in, *inter alia*, the workplace. *Id.* Since *Reese* it has been recognized that the statutory rights pursuant to RCW 49.60, *et. seq.* are entirely independent and different from contractual rights under a CBA. See *Morales v. Westinghouse Hanford Company*, 73 Wn.App. 367, 371-72, 869 P.2d 120 (1994).

Indeed, in *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn.App. 304, 237 P.3d 316 (2010) the appellate court concluded in the reverse scenario that issues presented in a lawsuit under RCW 49.60 and a CBA arbitration involve entirely different issues thus precluding the application of preclusion principles:

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual rights under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.

Yakima County, 157 Wn.App. at 330 citing to *Civil Service Commission v. City of Kelso*, 137 Wn.2d 166, 175, 969 P.2d 474 (1999), quoting *Reese*, 107 Wn.2d at 576.

Yakima County held that because of the distinctly different nature of contractual and WLAD statutory rights the doctrine of res judicata did not bar the pursuit of a CBA grievance following dismissal on summary

judgment of a discrimination lawsuit involving the same facts. The *Yakima County* court did not reach the issue of collateral estoppel because that issue ultimately was a matter to be resolved by the arbitrator." See also *Dowler v. Clover Park School District No. 400*, 172 Wn.2d 471, 486, 258 P.3d 676 (2011) (Inviting parents of children who are victim of discrimination within public schools to pursue both administrative and remedies under RCW 49.60. *et. seq.*).

Thus, as a matter of public policy, and in order to be consistent with the commands of RCW 49.60.020 the Supreme Court in *Reese* has already made a determination that a party can pursue *both* CBA remedies and if unsatisfied with the result, court claims pursuant to RCW 49.60. *et seq.* Based on the plain language of *Reese* the position of the defense in this case is not well taken. Plaintiff is merely doing what *Reese* intimated and permits, seeking to enforce his statutory rights because he is not satisfied with the results of the CBA arbitration.

Additionally, even assuming arguendo that preclusion principles can have application to an RCW 49.60 claim when the "other proceeding" is an arbitration pursuant to CBA provisions, (under *Reese* they cannot), upon the appropriate application of claim and/or issue preclusion principles it is quite clear that CBA arbitration, and a claim pursuing the vindication of civil rights under RCW 49.60 involve entirely different

matters. Because they involve entirely different matters the issue of identity of issues required to apply collateral estoppel is destroyed. Once the identity of issues is destroyed, collateral estoppel may not be applied.

Defendants attempts to dismiss the Plaintiff's claims by asserting a collateral estoppel bar founded upon a CBA labor arbitration must be rejected as unsupported by the law or policy of Washington. The summary judgment order must be reversed.

C. Billings Has Pled Viable Claims of Wrongful Termination in Violation of Public Policy.

Billings filed his initial wrongful termination Complaint alleging discrimination and retaliation for Billings disability or perceived disability; discrimination and retaliation for his lawful union activities; violation of RCW Title 41 and the Washington Law Against Discrimination, RCW 49.60, *et seq*; negligent and intentional infliction of emotional distress; wrongful termination in violation of public policy. Plaintiff's First Amended Complaint pg. 3 "Causes of Action" (CP 1560-64, 1832)

In the factual allegations of the Complaint Billings alleged *inter alia* that "Plaintiff was subjected to abusive, threatening and unlawful behavior by Defendant Schaub." "...Plaintiff opposed actions and policies proposed or implemented by Defendants." "Plaintiff filed formal complaints about Defendant Schaub's unlawful behavior." "Defendants

responded by taking adverse employment actions against Plaintiff. *Id.* Plaintiff stated that he had a role and was active as a union representative and in that capacity he opposed actions and policies of Defendants. *Id.* He specifically alleged claims of discrimination and retaliation for lawful union activity and wrongful termination in violation of public policy. *Id.*

Defendants assert in their motion for summary judgment that “Plaintiff’s complaint failed to articulate any actionable “public policy” on which this [wrongful termination in violation of public policy] claim is based. Thus, it should be dismissed.” Def. Mot. For S.J. pg. 17 (CP 30). Yet the Defendants provided no analysis of the public policy claim beyond reasserting their collateral estoppel claim. Courts treat a CR 12(b)(6) motion to dismiss for failure to state a claim as a motion for summary judgment when matters outside the pleadings are presented to, and not excluded by, the superior court. *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wash.2d 800, 802, 699 P.2d 217 (1985). Defendants’ apparent 12(b)(6) motion must also be denied regardless if it is analyzed as a 12(b)(6) motion or a summary judgment motion. The Union Employee stated viable public policy concerns supporting his wrongful termination claim, these issues include reporting dishonesty of Chief Straub, his active role in the labor union opposing unlawful activities, the waste of tax payer monies through cronyism, and his concerns about Steilacoom’s activities that violated the WLAD.

Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 685 P.2d 1081 (1984) first acknowledged the tort of wrongful termination in violation of public policy. In cases following *Thompson*, courts acknowledged that public policy tort claims generally arise in four areas: “(1) where the discharge was a result of refusing to commit an illegal act, (2) where the discharge resulted due to the employee performing a public duty or obligation, (3) where the [discharge] resulted because the employee exercised a legal right or privilege, and (4) where the discharge was premised on employee ‘whistleblowing’ activity.” *Dicomes v. State*, 113 Wash.2d 612, 618, 782 P.2d 1002 (1989) (citations omitted).

In *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996) the court declared that a plaintiff must prove the following four elements to succeed in a claim for wrongful discharge in violation of a public policy: (1) The plaintiffs must prove the existence of a clear [mandate of] public policy (the *clarity* element); (2) The plaintiffs must prove that discouraging the conduct in which [the employee] engaged would jeopardize the public policy (the *jeopardy* element); (3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the *causation* element); (4) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element). *Id.* at 941, 913 P.2d 377.

On September 17, 2015, the Washington Supreme Court decided three cases clarifying the continuing vitality of the common law tort of wrongful termination in violation of public policy.

Our decisions in the companion cases of *Rose* and *Becker* recognize that the strict adequacy analysis this court has sometimes embraced is inconsistent with the history and purpose of the tort of wrongful discharge. *Rose v. Anderson & Grain Co.*, No. 90975-0, slip op. at 20, —Wn.2d —, —, — P.3d —, 2015 WL 5455681 (Wn. Sept. 17, 2015); *Becker v. Cmty. Health Sys., Inc.*, No. 90946-6, slip op. at 5, —Wn.2d —, —, — P.3d —, 2015 WL 5455679 (Wash. Sept. 17, 2015); *see, e.g., Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). Those decisions announce a return to *Thompson*, in which we adopted the public policy tort in recognition that the at-will doctrine gives employers potentially “unfettered control of the workplace and, thus, allows the employer to take unfair advantage of its employees.” *Thompson*, 102 Wn.2d at 226, 685 P.2d 1081. *Thompson* observed that allowing an exception to the at-will doctrine serves to equalize the imbalance of power that exists in an employment relationship. *Id.* Our adoption of the common law tort thus signified that the at-will doctrine can no longer “be used to shield an employer’s action which otherwise frustrates a clear manifestation of public policy.” *Id.* at 231, 685 P.2d 1081.

Rickman v. Premera Blue Cross, No. 91040-5, 2015 WL 5455799, at *4 (Wash. Sept. 17, 2015).

The public policy enunciated in the Washington Law Against Discrimination RCW 49.60, *et seq.* (WLAD) has been repeatedly applied in these public policy wrongful discharge cases. In *Griffin v. Eller*, 130 Wn.2d 58, 922 P.2d 788 (1996) a termination in violation of public policy

case was pursued against an attorney who allegedly sexually harassed his lone employee in his small law firm. The jury found in favor of the defendant on the public policy claim and the court made no mention of an issue with suing the employer and the principal agent of the employer. Both the WLAD, RCW 49.60.201 and the Americans With Disabilities Act, 42 U.S.C.A. § 12203 prohibit retaliation against persons for asserting their legal rights.

In *Bennett v. Hardy*, 113 Wn.2d 912, 915-29, 784 P.2d 1258, 1259-66 (1990) the plaintiffs sued a former employer a dentist and his wife alleging age discrimination and wrongful discharge. The employer employed fewer than eight employees and therefore was not within the definition of "employer" as set out in the law against discrimination, RCW 49.60. The Court recognized an implied cause of action under RCW 49.44.090 which makes age discrimination against an employee between the ages of 40 and 70 an unfair practice.

Smith v. Bates Technical College, 139 Wash.2d 793, 991 P.2d 1135 (2000). *Smith* recognized that an employee protected by a collective bargaining agreement may bring a common law claim for wrongful termination based on the public policy provisions of chapter 41.56 RCW notwithstanding the administrative remedies available through Public Employment Relations Commission "(PERC").

Piel v. City of Fed. Way, 177 Wash. 2d 604, 612–13, 306 P.3d 879, 882 (2013) reinforced that a police officer can pursue a claim of termination in violation of public policy for his union activities, notwithstanding that he had viable claims he could pursue before PERC. “[S]tatutory remedies available to public employees through PERC are inadequate—and a wrongful discharge tort claim is therefore necessary—to vindicate the important public policy recognized in chapter 41.56 RCW” *Id.* at 177 Wash. 2d, 617–18, 306 P.3d, 884–85. Billings has properly pled a claim of wrongful termination in violation of public policy.

Billings concerns about unfair hiring, payment of wages, unfair labor practices and discriminatory conduct all implicate his claim of wrongful termination in violation of public policy and those claims should not have been dismissed.

For the reasons discussed in this brief above, it is not appropriate to dismiss Billings claims by offensive use of collateral estoppel. Application of collateral estoppel fails because there are (1) no identical issues, (2) no final judgment on the merits, (3) no identity of the parties, and (4) application of collateral estoppel would work an injustice against Billings.

Billings claim for wrongful termination in violation of public policy has a three year statute of limitations. *Barnett v. Sequim Valley Ranch, LLC*, 174 Wash. App. 475, 485, 302 P.3d 500, 505 (2013). His claims were brought within the limitation period, as extended by the tort claim filing requirements.

D. Billings Requests Attorney's Fees for This Appeal.

RCW 49.60.030(2), the remedial provision of RCW Ch. 49.60, provides the cost of suit including a reasonable attorney's fees. *Xieng v. Peoples Nat. Bank of Washington*, 120 Wash. 2d 512, 526-27, 844 P.2d 389, 396-97 (1993). Attorney fees may be awarded in 42 U.S.C. § 1983 actions as set forth in 42 U.S.C. § 1988. *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wash. 2d 245, 287-91, 4 P.3d 808, 830-32 (2000). Pursuant to RAP 18.1 Billings requests that attorneys' fees be awarded for this appeal.

V. CONCLUSION

The court below erred in dismissing the Union Employee's claim through the application of collateral estoppel from an adverse labor arbitration brought by Billings' union. The Union Employee properly pled and supported his claims of wrongful termination in violation of public policy. The trial court improperly struck the Declaration of Glen

Carpenter. The Union Employee should be awarded attorneys' fees for prosecuting this appeal of his claims.

RESPECTFULLY SUBMITTED this 8th day of December, 2016.

KRAM & WOOSTER, P.S.



Richard H. Wooster, WSBA 13752
Attorney for Appellant

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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JOSHUA BILLINGS)	Cause No. 49631-3-II
Appellants)	
)	DECLARATION OF
vs.)	SERVICE
)	
TOWN OF STEILACOOM, ET AL)	
)	
)	
<u>Respondents</u>)	

KNOW ALL PERSONS BY THESE PRESENTS: That I, Connie DeChaux, the undersigned, of Bonney Lake, in the County of Pierce and State of Washington, have declared and do hereby declare:

That I am not a party to the above-entitled action, am over the age required and competent to be a witness;

That on the 9th day of December, 2016, I delivered via ABC Legal Messenger and via email a copy of the following documents:

1. Declaration of Service;
2. Brief of Appellants;

properly addressed to the following person:

